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Supreme Court, U.S.
FILED
MAR 12 1999
OFFICE OF THE CLERK

No. 98-1112

In the Supreme Court of the United States

OCTOBER TERM, 1998

ROY MACK WEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the delay between petitioner's indictment and the commencement of his trial violated the 70-day time limit of the Speedy Trial Act of 1974, 18 U.S.C. 3161(c)(1).

2. Whether the district court committed plain error in failing to instruct the jury that it must agree unanimously on which particular drug violations constituted the "continuing series of violations" required for conviction for engaging in a continuing criminal enterprise in violation of 21 U.S.C. 848.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 142 F.3d 1408.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1998. A petition for rehearing was denied on October 13, 1998. Pet. App. 18a-19a. The petition for a writ of certiorari was filed on January 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Alabama, petitioner was convicted of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848.[1] He was sentenced to life imprisonment. The court of appeals affirmed. Pet. App. 1a-16a.

1. The Speedy Trial Act of 1974 (Speedy Trial Act) provides that

> [i]n any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

18 U.S.C. 3161(c)(1). The Act also states, however, that certain "periods of delay shall be excluded * * * in computing the time within which the trial of any such offense must commence." 18 U.S.C. 3161(h). The Act identifies certain instances in which periods of delay are excluded as a matter of law. 18 U.S.C. 3161(h)(1)-(7).

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[1] Petitioner was also convicted of conspiring to possess with intent to distribute and to distribute marijuana, cocaine, and methamphetamine, in violation of 21 U.S.C. 846. Following petitioner's CCE conviction, the district court vacated his drug conspiracy conviction on the authority of *United States* v. *Nixon*, 918 F.2d 895 (11th Cir. 1990). See Pet. App. 5a. In *Nixon*, the court stated that "when a defendant is convicted and sentenced under a section 846 conspiracy count and a section 848 CCE count, the rule in this circuit has been to merge the two offenses by vacating the sentence *and* conviction of the lesser-included section 846 conspiracy." 918 F.2d at 908.

Those include, *inter alia*, any "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(F). The Act further provides for the exclusion of

> [a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay * * * shall be excludable * * * unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 U.S.C. 3161(h)(8)(A).

2. From the late 1980s until his arrest in February 1995, petitioner directed a large-scale drug trafficking organization that distributed marijuana, methamphetamine, and cocaine. Beginning in 1988, petitioner hired co-conspirator James Brennan to purchase three parcels of land in New Mexico to be used as "ranches" for cultivating marijuana. Law enforcement officers raided two of the ranches in 1989 and seized more than 1000 marijuana plants, as well as chemicals and glassware used to manufacture methamphetamine. Petitioner also directed another member of the organization, George Robert Booth, to purchase property in Kansas to be used in growing marijuana. In addition, petitioner purchased large amounts of methamphetamine, which

Booth then sold or distributed to other members of the organization. Booth also introduced petitioner to Harold Hall, from whom petitioner purchased between 20 and 25 kilograms of cocaine. From 1991 through 1993, petitioner purchased between 6000 and 7000 pounds of marijuana from co-conspirator Lloyd David Shipley at a total cost of more than $5 million. In 1994, petitioner loaned Shipley more than $300,000 to purchase equipment and chemicals to be used in manufacturing methamphetamine. Pet. App. 2a-4a.

3. Law enforcement authorities began investigating petitioner's drug trafficking activities in the fall of 1984. Pet. App. 2a. Petitioner became a fugitive in 1986, after a federal district court issued a warrant for his arrest. *Ibid.* On June 10, 1993, a federal grand jury returned an indictment charging petitioner with drug trafficking offenses. *Id.* at 4a & n.2. The grand jury returned a superseding indictment on August 10, 1994, and returned a second superseding indictment on February 9, 1995. *Ibid.* That indictment charged petitioner with one count of violating the Travel Act, 18 U.S.C. 1952(a)(3); one count of conspiracy to violate the Travel Act, in violation of 18 U.S.C. 1952(a)(3) and 371; one count of conspiring to distribute marijuana from on or about the summer of 1988 until on or about September 1989; and one count of conspiring to distribute marijuana from 1991 through 1993. 2/9/95 Indictment 1-5. Petitioner was arrested on February 4, 1995, and he appeared in court on February 9, 1995. Pet. App. 4a & n.2, 6a.

On April 5, 1995, the grand jury issued a new indictment, which charged petitioner with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count One), and charged petitioner and several co-defendants with conspiring to possess and distribute

marijuana, cocaine, and methamphetamine, in violation of 21 U.S.C. 846 (Count Two). Pet. App. 4a, 6a-7a. Count Two alleged that the conspiracy had extended "from on or about October of 1986, until on or about the 4th day of February 1995." 4/5/95 Indictment 3.[2] The district court subsequently granted the government's motion to dismiss the February 9, 1995, indictment. Pet. App. 6a-7a.

On May 4, 1995, the government filed a motion to continue petitioner's trial, anticipating that the grand jury would return a superseding indictment against him. Pet. App. 4a, 7a. On May 26, 1995, petitioner executed a waiver of his rights under the Speedy Trial Act through August 7, 1995. *Id.* at 4a-5a, 7a. The district court granted the government's motion for continuance on June 1, 1995, basing its decision in part on petitioner's waiver of his speedy trial rights and his lack of objection to the continuance. *Id.* at 17a; see *id.* at 5a, 7a. The court rescheduled petitioner's trial for August 7, 1995, and the trial began on that date. *Id.* at 5a, 17a. At trial, petitioner moved to adopt several motions filed by one of his co-defendants, including a motion to dismiss the indictment based on alleged speedy trial violations. The district court granted petitioner's motion to adopt his co-defendant's motions, but denied the motion to dismiss. *Id.* at 7a.

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[2] On June 7, 1995, the grand jury returned a superseding indictment that added an additional defendant to Count Two. A second superseding indictment returned on July 13, 1995, changed the time period during which the offenses were alleged to have occurred and added additional allegations to the conspiracy count. Pet. App. 5a. The July 13, 1995, indictment alleged that the offenses had occurred "from on or about December of 1984, until on or about the 4th day of February 1995." 7/13/95 Indictment 1, 3.

4. At the conclusion of the trial, the district court instructed the jurors that in order to convict petitioner on the CCE count, "the government must show beyond a reasonable doubt, one, a felony violation of the federal narcotics laws; two, as part of a continuing series of violations; three, in concert with five or more persons; four, for whom the defendant is an organizer or supervisor; and, five, from which he derives substantial income or resources." Tr. 2369-2370; see Pet. App. 13a n.6. With respect to the "continuing series of violations," the court explained that "while the statute does not precisely say * * * what the obligation is of the government in the way of proof as to how many of those acts it has to prove, * * * it's been developed in the case law of this circuit, that there must be proof of at least three." Tr. 2372. Thus, the court stated, the government "must assert and satisfy you by proof beyond a reasonable doubt that three or more of the acts or transactions" charged in the indictment occurred. Tr. 2373. Finally, after the prosecutor and defense counsel had commented on the jury charge, the court reminded the jurors that to convict petitioner on the CCE count, the government must prove "not only the conspiracy" charged in the indictment "but two other drug felonies." Tr. 2386. The jury convicted petitioner on both counts of the indictment. Pet. App. 5a.

5. The court of appeals affirmed. Pet. App. 1a-16a. Petitioner contended, *inter alia*, that his rights under the Speedy Trial Act had been violated because his trial had not commenced within 70 days after his first appearance in court on the drug trafficking charges, as required by 18 U.S.C. 3161(c)(1). Petitioner argued that 177 unexcluded days had elapsed between his first appearance and his trial and that the district court had

therefore erred in not dismissing the indictment. Pet. App. 6a.

The court of appeals rejected that claim. As an initial matter, the court concluded that although petitioner's first appearance on February 9, 1995, "triggered the running of his speedy trial clock," the government's dismissal of the original indictment and petitioner's re-indictment on April 5, 1995, "triggered a new seventy-day time period." Pet. App. 6a-7a. Thus, the court stated, petitioner's "speedy trial clock restarted with the April 5, 1995 indictment." *Id.* at 7a. The court also held that petitioner had made a valid waiver of his speedy trial rights on May 26, 1995. *Id.* at 7a-8a. The court explained that petitioner had "executed this waiver well within the limits of the Act (50 days had elapsed since the April 5, 1995 * * * indictment), and he has not presented any other evidence demonstrating that this was not a 'knowing and intelligent' waiver." *Ibid.*

The court of appeals likewise rejected petitioner's claim that the district court had erred by granting the government's motion to continue his trial without making a specific finding, pursuant to 18 U.S.C. 3161(h)(8), that the continuance would serve the "ends of justice." Pet. App. 8a-9a. The court noted that the district court had granted the continuance based in part on the defendants' speedy trial waivers and their failure to object to the continuance. *Id.* at 8a. The court observed as well that the government had cited as grounds for the continuance the fact that the grand jury was prepared to return a superseding indictment, the government's need for more time to compile discovery materials, and the defendants' need for additional time to file any necessary motions after they received the discovery materials. *Id.* at 8a-9a. Based on its review

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of the record and the district court's order, the court of appeals concluded that "the [district] court did not abuse its discretion and that the continuance served the 'ends of justice.'" *Id.* at 9a.

The court of appeals also held that the district court had erred in allowing the government to introduce into evidence a notebook containing records of drug transactions, but that the error was harmless in light of the "overwhelming evidence" of petitioner's guilt on the CCE charge. Pet. App. 9a-14a. The court rejected without discussion petitioner's other claims, including his challenges to the district court's jury instructions. *Id.* at 5a n.3.

ARGUMENT

1. Petitioner contends (Pet. 5-12) that he was brought to trial outside the 70-day limit of the Speedy Trial Act. That claim lacks merit and does not warrant this Court's review.

a. Petitioner contends (Pet. 6) that the 70-day period between indictment and trial permitted by the Speedy Trial Act began to run on February 9, 1995, the date of his first court appearance, rather than (as the court of appeals concluded, see Pet. App. 6a-7a) on April 5, 1995, when the grand jury returned a new indictment. Even assuming that the 70-day period began to run on the earlier date, however, petitioner cannot establish a Speedy Trial Act violation.

Under the Speedy Trial Act, any "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" is excluded from the 70-day period permitted between indictment (or first court appearance) and trial. 18 U.S.C. 3161(h)(1)(F). That provision broadly applies to all

pretrial motions, whether or not they actually cause a postponement of trial. *Henderson* v. *United States*, 476 U.S. 321, 327 (1986) (exclusion is automatic). Moreover, it is well settled that in joint trials, a period of delay resulting from a motion filed by one defendant is excludable as to the co-defendants as well. See, *e.g.*, *United States* v. *Santiago-Becerril*, 130 F.3d 11, 19 (1st Cir. 1997); *United States* v. *Mejia*, 82 F.3d 1032, 1035 (11th Cir.), cert. denied, 519 U.S. 872 (1996); *United States* v. *Neville*, 82 F.3d 750, 763 (7th Cir.), cert. denied, 519 U.S. 899 (1996).

In the instant case, much of the period between February 9, 1995, and August 7, 1995, was excludable because of numerous pretrial motions filed by petitioner and his co-defendants. Those included co-defendant Robert Douglas Williams's Motion for Early Disclosure of Jencks Act Material (filed March 2, 1995), which served to exclude all time between March 2, 1995, and March 15, 1995; co-defendant Leroy Steven Wofford's Motion to Suppress Defendant's Statements or Admissions (filed April 20, 1995), which served to exclude all time between April 20, 1995, and May 19, 1995; co-defendant Williams's Motion for Disclosure of Witness List (filed April 28, 1995), which served to exclude all time between April 28, 1995, and May 27, 1995; co-defendant Wofford's Motion for Disclosure of Government's Intent to Use Rule 404(b) Evidence (filed June 6, 1995), which served to exclude all time between June 6, 1995, and July 5, 1995; petitioner's Motion for Pre-trial Disclosure of Government's Intention to Rely on "Similar Acts" Evidence (filed June 26, 1995), which served to exclude all time between June 26, 1995, and July 25, 1995; and co-defendant Wofford's Motion for Bill of Particulars (filed July 28, 1995), which served to exclude all time between July 28, 1995, and August 7,

1995. See 18 U.S.C. 3161(h)(1)(F) and (J). After those periods are excluded, petitioner's trial commenced within 70 days after his first appearance in court on February 9, 1995. Accordingly, petitioner was brought to trial in conformity with the Speedy Trial Act, even assuming that no new 70-day period was triggered by issuance of the replacement indictment on April 5, 1995.[3]

b. Petitioner also briefly challenges the court of appeals' conclusion that the continuance granted by the district court from June 1, 1995, until August 7, 1995, was a valid "ends of justice" continuance authorized by 18 U.S.C. 3161(h)(8). Although petitioner consented in the district court to the government's motion for that continuance (see Pet. App. 7a), he now suggests (Pet. 12) that the continuance was invalid because the district court failed to make "any specific finding in the record to justify such a continuance." As we explain above, in light of the various motions filed by petitioner and his co-defendants, no Speedy Trial Act violation would

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[3] The court of appeals stated that "the government's dismissal of [petitioner's] original indictment, and the subsequent ('replacement') indictment, triggered a new seventy-day time period." Pet. App. 7a. The suggestion that the filing of the new indictment automatically reset the speedy trial clock appears to be too broad. Under 18 U.S.C. 3161(h)(6), the period between the government's dismissal of an indictment and the later filing of a charge against the defendant "for the same offense, or any offense required to be joined with that offense" is excluded from the computation of time within which trial must commence. That exclusion presupposes that the first (dismissed) indictment for the offense continues to provide the starting time for the speedy trial clock. Despite the apparent overbreadth of the court of appeals' rationale, however, the judgment in this case is correct for reasons apparent from the record, although the government did not rely on those reasons in the courts below.

have occurred even if the district court had not granted the June 1, 1995, continuance.

In any event, the court of appeals was correct in treating the district court's June 1, 1995, order as a permissible "ends of justice" continuance. After examining the record and the district court's order, the court of appeals concluded (Pet. App. 9a) that "the continuance served the 'ends of justice'" and that the district court therefore had not abused its discretion in granting the motion to continue petitioner's trial. When presented with similar circumstances, other courts of appeals have held that a district court need not engage in an explicit balancing of interests if it is clear from the record that it considered the relevant factors and reached an appropriate decision. See, *e.g.*, *United States* v. *Spring*, 80 F.3d 1450, 1456 (10th Cir.), cert. denied, 117 S. Ct. 385 (1996); *United States* v. *Eakes*, 783 F.2d 499, 503-504 (5th Cir.), cert. denied, 477 U.S. 906 (1986); *United States* v. *Wiehoff*, 748 F.2d 1158, 1159-1160 (7th Cir. 1984).[4]

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[4] Petitioner's reliance (see Pet. 12) on *United States* v. *Jordan*, 915 F.2d 563 (9th Cir. 1990), and *United States* v. *White*, 864 F.2d 660 (9th Cir. 1988), is misplaced. In *Jordan*, the court of appeals found a Speedy Trial Act violation where the district court granted an "ends of justice" continuance without "indicat[ing] when, if ever, the continuance would terminate," and then—over a year later—granted a second continuance which extended the defendants' trial date by more than 70 days with "no apparent basis for the exclusion of the time, other than the original ends of justice order." 915 F.2d at 564-566. In this case, by contrast, the district court's order specified the date on which petitioner's trial would begin, and the court of appeals found that the basis for granting a continuance was evident from the record. The Ninth Circuit's decision in *White* is even less helpful to petitioner. In that case, the court of appeals merely remanded for the district court to provide a more detailed explanation of its reasons for dismissing

2. Petitioner also contends (Pet. 12-15) that the district court erred in failing to instruct the jury that it must unanimously agree on which drug violations constituted the "continuing series of violations" required for conviction on the CCE count.[5] That issue is currently before this Court in *Richardson* v. *United States*, No. 97-8629 (argued Feb. 22, 1999). Unlike Richardson, however, petitioner did not object at trial to the district court's failure to give the specific unanimity instruction he now contends was required. Thus, in order to prevail on his claim, petitioner must show that the alleged error was "plain," that it "affect[ed] substantial rights," and that it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 732 (1993); see *Johnson* v. *United States*, 520 U.S. 461 (1997). Nevertheless, because the decision in *Richardson* may affect the analysis of petitioner's claim

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the indictment without prejudice after finding a Speedy Trial Act violation. 864 F.2d at 661.

[5] Petitioner asserts (Pet. 15) that "the jury was not instructed that the violation was required to be part of a continuing series of related drug felonies." That statement is inaccurate. The district court instructed the jurors that to obtain a conviction on the CCE count, the government was required to "show beyond a reasonable doubt * * * a felony violation of the federal narcotics laws * * * as part of a continuing series of violations." Tr. 2369-2370. The court later reminded the jurors that the government must prove "not only the conspiracy" charged in the indictment "but two other drug felonies" as well. Tr. 2386. Petitioner's assertion (Pet. 15) that the "required proof was further diluted" by the court's statement that the CCE statute did not specify "what the obligation is of the government in the way of proof as to how many of those acts it has to prove," see Tr. 2372, is likewise unavailing. The district court immediately informed the jurors that "the law of this circuit [requires] that there must be proof of at least three." *Ibid.*

of error, the Court may wish to hold this petition pending its ruling in *Richardson*.

CONCLUSION

With respect to the second question presented, the Court may wish to hold the petition for a writ of certiorari pending the Court's decision in *Richardson* v. *United States*, No. 97-8629, and then dispose of the case as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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MARCH 1999